No. [illegible]

[illegible] of the State of New York, ex rel.
Hamparsoum Chooklikian,

Petitioner,

against

[illegible] of the Immigration Service and John J. [illegible], executive director, who is the person in charge [illegible] having custody of the detained infants hereinafter named, and Raymond M. Hilliard, as Commissioner [illegible] Department of Welfare of the City of New York,

Respondents.

The People of the State of New York, ex rel.
Hamparsoum Chooklikian,

Petitioner,

against

The New York Foundling Hospital and Sister Mary [illegible], superintendent, who is the person in charge thereof or having custody of the detained infant hereinafter named, and Raymond M. Hilliard, as Commissioner of the Department of Welfare of the City of New York,

Respondents.

PETITIONER'S REPLY BRIEF

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Supreme Court of the United States

OCTOBER TERM, 1949

No. 538

THE PEOPLE OF THE STATE OF NEW YORK, ex rel. HAMPORTZOON CHOOLOKIAN,

Petitioner,

against

THE MISSION OF THE IMMACULATE VIRGIN and JOHN J. CORRIGAN, executive director, who is the person in charge thereof or having custody of the detained infants hereinafter named, and RAYMOND M. HILLIARD, as Commissioner of the Department of Welfare of the City of New York,

Respondents.

THE PEOPLE OF THE STATE OF NEW YORK, ex rel. HAMPORTZOON CHOOLOKIAN,

Petitioner,

against

THE NEW YORK FOUNDLING HOSPITAL and SISTER MARIE MADELEINE, superintendent, who is the person in charge thereof or having custody of the detained infant hereinafter named, and RAYMOND M. HILLIARD, as Commissioner of the Department of Welfare of the City of New York,

Respondents.

PETITIONER'S REPLY BRIEF

The brief submitted by the institutions-respondent barely touches upon the important constitutional questions involved in this case. It deals mainly with extraneous matters hardly relevant to the constitutional problems, clearly intended to befog the real issues in this case. It also misrepresents the facts of the case. It is impossible for us to

refer to all of the untrue or misleading statements contained in the brief, but we feel constrained to refer to some of them, since a failure to do so might place the case out of focus. We shall, however, do our best to be brief.

I

The public importance of the case.

Throughout their brief as well as in the enumeration of points in the section labeled "Conclusion", counsel endeavor to present the case as if it were merely a private litigation between Mr. Choolokian on the one hand and the institutions on the other over the question as to who is to bring up petitioner's three minor children,—a matter in which the public is hardly concerned and involving no constitutional questions and, in this connection, counsel even made the bold statement that the constitutional questions were never adverted to in the trial court but was an "afterthought". In itself this would hardly be of any importance, since under the rules of this Court it is sufficient that the questions were raised in the State Courts during any stage of the proceeding; and the undeniable fact is that the questions were raised in the Court of Appeals as that Court has specifically certified (R. 444-5). However, the question is of importance as showing the public interest in the case. The great public interest which the case aroused, and which could only be due to the constitutional issues involved, showed itself at the very commencement of the litigation as evidenced by the fact that two religious bodies as well as the American Civil Liberties Union have participated in the trial at Special Term. This interest was, of course, maintained throughout. The official report of the case in the Court of Appeals shows that both the religious institutions as well as the American Civil Liberties Union filed briefs in that court (300 N. Y. 43). And Mr. Charles G. Coster, one of the counsel who signs the brief in this court, filed an affidavit in the Appellate Division of the

New York Supreme Court, verified February 14, 1948, in which he stated that while the case was on trial before Mr. Justice Lumbard, counsel for the American Civil Liberties Union "threatened" to take the case to this Court, if necessary,—which would be nonsense if the constitutional questions had not been raised in that court. In his said affidavit Mr. Coster averred:

> "If, therefore, the Soviet Consulate or any one of the amici curiae, to wit, the American Civil Liberties Union, the Human Relations Commission of the Protestant Council of the City of New York, or the American Apostolic Orthodox Church, Diocese of the Armenian Church in North America, desired to appeal herein, there is no reason why they should seek to do so at public expense or at the expense of the respondent institutions. Counsel for the American Civil Liberties Union told deponent, at the trial before Mr. Justice Lumbard, and before the trial was even completed, that unless deponent changed the legal position of his client to conform to the suggestions of said counsel for the American Civil Liberties Union, it would appeal to the Supreme Court of the United States."

And he added:

> *"The issues in this case are important not only to the Respondent institutions, but to every American citizen and every American institution."* (Emphasis supplied.)

The public importance of this case is also attested by the fact that very recently the American Church Committee for Armenia published a long pamphlet dealing with this case, entitled "The Case of the Choolokian Family—A New Phase in the History of the Struggle for Religious Freedom in America", the first three paragraphs of which read as follows:

> "A new chapter in the history of the struggle for religious liberty is being written today around the person of a humble Armenian shoemaker named Hamportzoon Choolokian and his efforts to regain custody of his three children, detained by two Roman Catholic institutions in New York. While the legal

suits incited by these institutions have been pending in the courts, the children have been systematically indoctrinated in the faith of the Catholic Church, against the expressed wishes of their father, who is not and never has been a Roman Catholic.

Here is a case in which the paramount natural right of the parent to his children is being flouted by the very Church which so aggressively has maintained the doctrine of parental rights to justify the establishment of the parochial school system in America.

The Roman Catholic Church reserves to itself the right to determine the type of education, secular and religious, the children of Catholic parents should receive. Canon 1374 of the Church reads: 'Catholic children must not attend non-Catholic, neutral, or mixed schools, that is, such as are also open to non-Catholics. It is for the local Ordinary (Bishop) alone to decide, according to the instructions of the Apostolic See in what circumstances and with what precautions attendance at such schools may be tolerated, without danger or perversion to the pupils.'"

The concluding paragraph of this pamphlet reads as follows:

> "All true Americans will unite to keep intact the sacred rights of the family and the principle of the separation of church and state, and will not abandon the Choolokian family to its present fate. They will see to it that the Choolokian children are liberated from the institutions which have virtually imprisoned them, and returned to the love and warmth which only their parents can give."

The pamphlet also states that a committee had been formed under the name of "National Committee for the Rights of the Choolokian Family", which includes among its members the following religious and civic leaders: Glen L. Archer, Washington, D. C.; Algernon D. Black, leader, Society for Ethical Culture; Dean Harold A. Bosley, Divinity School, Duke University; Dr. Lewis B. Carpenter, president, National College for Christian Workers; Dr. Samuel McCrae Cavert, general secretary, Federal Council of the Churches

of Christ in America; Professor Lawson P. Chambers, Washington University; Dr. Robert Cummins, superintendent, Universalist Church in America; Dr. Frederick L. Fagley, secretary emeritus, Congregational Christian Churches of America; Dr. John W. Harms, executive vice-president, Church Federation of Greater Chicago; Dr. Henry Smith Leiper; Professor Emil Lengyel, New York University; Judge Leslie J. Lyons, Kansas City, Mo.; Rt. Rev. Norman B. Nash, bishop of the Diocese of Massachusetts; Professor Reinhold Niebuhr, Union Theological Seminary; Bishop G. Bromley Oxnam, the Methodist Church, New York City; Rev. Edward Pruden, First Baptist Church, Washington, D. C.; Dr. Frederick Reissig, executive secretary, Washington Federation of Churches, Washington, D. C.; Dr. Robert W. Searle, Protestant Council of New York; Rev. Donald Timmerman, executive secretary, Franklin County Council of Churches, Columbia, Ohio; Rt. Rev. Bishop Tiran, prelate of the Armenian Church in North America; Bishop Raymond J. Wade, Bay View, Michigan; Dr. Carl Hermann Voss, American Christian Palestine Committee.

The pamphlet also contains a bibliography of articles which appeared in public print, listing 44 items during the period commencing from November 2, 1947 to December 15, 1949, and including publications as far as the Pacific Coast. We may add that this bibliography is incomplete to our knowledge.

II

"The interest of the children."

In their effort to evade the real issue in the case counsel for the institutions-respondent repeatedly assert that the only concern of the institutions-respondent is "the interest of the children",—thus, casting a slur upon the great religious bodies who have interested themselves on behalf of petitioner, as if they were unmindful of those interests.

Needless to say, the religious bodies who have interceded on behalf of petitioner and his children are at least as mindful of the interests of these children as are the institutions-respondent. But in addition, they are also mindful of the grave constitutional questions involved in this case,—a discussion of which the institutions-respondent sedulously avoid. The reason is obvious: the Constitution of the United States as interpreted by this Court, confides the interest of minor children to their parents. It is true, of course, that the right of the parents to take care of the material and moral well-being of their children is not absolute,—any more than are the rights of life, liberty or property.

Under certain conditions all of these rights may be forfeited; but the action of the State in all such matters is subject to the supervision of this Court in order to insure that the so-called Police Power of the State will not be exercised in violation of the provisions of the United States Constitution. This would be true even if the question concerned the care and custody of these children within the State of New York. It is particularly true when the State of New York has *no concern whatever* with this care and custody, since the children were to depart with their father to a foreign country, and their protection in that country,—in so far as the United States maintains a concern therein, devolves upon the Federal Government. Under these conditions neither the Welfare Department of the City of New York nor any other State agency, including its judiciary, have any say in the matter after the Congress of the United States and the Executive Department of the United States Government have spoken. And both have spoken emphatically, the Congress of the United States in the enactment of the laws on the subject of expatriation and the citizenship of minor children,—which is merely a codification of fundamental constitutional rights recognized long before these specific enactments; and the Executive Department by the specific agreement under which petitioner and his children sought to leave for Soviet Armenia.

It is characteristic of the method pursued by counsel for the institutions-respondent that, instead of discussing the provisions of Section 807 of the Nationality Code, they fail even to mention it in their brief. Instead, having barely adverted to the right of expatriation guaranteed by Section 800, they immediately switch to what the State Court said in its attempt to deprive petitioner and his children of the right guaranteed to them by those two sections of the Nationality Code. If what counsel say in this connection means anything, it means that notwithstanding the provisions of the Nationality Code, the basic right of expatriation and of the right of a parent to take his children with him when going abroad, the State of New York has a right to prevent the parent from taking his children with him if it is not satisfied with the protection offered by the provisions of the Nationality Code as to the citizenship and the material well-being of the minor children abroad. It is sufficient to point out that if the proposition thus contended for be correct, the State of New York would have had the right to prevent petitioner's other two minor children from leaving with him for Soviet Armenia. As far as we know there is no difference between petitioner's two groups of children with respect to the Police Power of the State of New York.

The protective power of the State, in so far as it exists, extends to all minors within its borders. Indeed, it would apply to all the minor children who left on the S.S. *Rossia* on November 1, 1947, as well as to others who may seek to depart under the provisions of the agreement between the Government of the United States and the Government of the USSR regarding the expatriation or "repatriation" of Armenians. All such minors born in the United States are exposed to the same alleged hazards as are the petitioner's three children. Surely, if such hazards exist it is the business of the United States to protect these American citizens, and not that of the several States where they, severally, happen to reside at the time of their parents' expatriation.

In enacting Sections 800 and 807 of the Nationality Code Congress was aware of these possible hazards; and so, cer-

tainly, was the Executive Department of the United States in entering into the compact with the USSR covering the expatriation of Armenians. The matter of the material well-being of minor citizens of the United States who were to accompany their parents under this compact was in no situation different than that of petitioner's minor children detained by the institutions-respondent herein. If the doctrine contended for by counsel for respondents herein be correct, each one of the States where such Armenians reside would have the right to inquire into and decide for itself as to the adequacy of the protection afforded the citizenship of the minors by Section 807 of the Nationality Code and the sufficiency of the provisions made in Soviet Armenia for the material well-being of the children.

Nay, they would even have the right to inquire into the religious upbringing that these children would receive in Soviet Armenia. For, it must be remembered, that one of the principal questions tried at Special Term in this case concerned the provision in Soviet Armenia for the religious education of these children, and the motion to dismiss at the end of the entire case stressed the fact that there was no evidence in the case that provision had been made for bringing up these children in the Roman Catholic faith (fol. 1091).

The learned Court at Special Term skirted around the religious question, and the Appellate Courts never adverted to it. But an examination of the Record will clearly demonstrate that the real reason for the decision was the fact that the State Courts undertook to "protect" petitioner's minor children against the kind of religious and political upbringing to which they might be exposed in Soviet Armenia. No amount of beating about the bush, or of double talk, can hide this fact which permeates the Record from beginning to end,—from the clear issue framed by the "returns" made by the institutions-respondent to the elaborate evasion of the issue in the opinion by the Justice who presided at Special Term, nor even by the more labored attempts to evade the issue in the briefs of the institutions-respondent.

III

The Constitution, the statutes, and the compact.

As pointed out in our main brief the basic facts of this case clearly deprive the several States of any power to interfere with the free departure of petitioner and his minor children for Soviet Armenia. This would be so even if Congress had never legislated on the subject,—for, as we have shown, the several States of our Union were never sovereign in the sense that they had the power to prevent the departure of their inhabitants from their territory, and certainly no power to interfere either directly or indirectly, in foreign affairs, as to which the Union was the only existing sovereign power even before the adoption of the Constitution. In this respect the Constitution merely stated explicitly what was implicit in the nature of our Union. And the Act of Congress of 1868, now embodied in the Nationality Code, merely put in statutory form what was theretofore a fundamental constitutional principle implicit in the nature of our Union and antedating the Constitution itself.

It is therefore true, as stated by counsel for respondent Welfare Commissioner on page 5 of his brief that petitioner and his children were possessed of the rights contended for here "without the need for further treaty or agreement" between the Government of the United States and the USSR. But that does not destroy the fact that *there was* such an agreement which has the force of a treaty as shown in our main brief. Counsel for the institutions-respondent without attempting to discuss the constitutional principles involved limit themselves to the assertion that the exchange of notes did not constitute an "agreement". But this Court has stated repeatedly that the form of the document or its lack of form makes not the slightest difference; nor does it make any difference by what name it is called, whether treaty, compact, agree-

ment, arrangement, protocol or *modus vivendi*. It so happens, however, that the State Department itself has called this exchange of notes an agreement. In the telegram sent by the State Department on October 31, 1947, in answer to an inquiry by the respondent Welfare Commissioner, the State Department said:

> "Under *agreement* with Soviet Embassy this Government interposes no objection to departure of persons of Armenian origin whether American Citizens or not from United States to Soviet Armenia." (Emphasis supplied—Petitioner's Ex. 17, fols. 555-556.)

IV

Petitioner's alleged "disappearance".

In their efforts to befog the issue, and to make the decision in this case appear to depend on a question of State law, counsel for the institutions-respondent have resorted not only to matters outside of the Record, but to deliberate misstatements of facts in connection therewith.

On page 2 of their brief counsel say:

> "Accordingly, petitioner on November 1, 1947, boarded the *SS Rossia* • • • and disappeared with his insane wife behind the Iron Curtain."

And throughout the brief there are scattered ambiguous phrases which, taken in connection with the flat assertion of petitioner's "disappearance", would lead the court to believe that petitioner has not been heard from since he left this country and that nobody has been in communication with him. The fact is that on January 15, 1948, two weeks after Mr. Justice Lumbard rendered his decision, Bishop Tiran Nersoyan wrote to him informing him of the decision, and he immediately responded by a letter dated February 18, 1948. At the same time petitioner wrote to his counsel and also to the respondent Welfare Commis-

sioner enclosing a formal demand for the transfer of his children to a Protestant home or a private Armenian family with a view to having them educated in his own religion. The original of the documents addressed to the Welfare Commissioner are in the possession of that respondent; and copies of all of them have been served on all of the respondents. Copies are also on file in a proceeding now pending in the Supreme Court, New York County, known as No. 33360/1948, being the proceeding referred to on page 33 of respondents' brief. The letter to the Welfare Commissioner reads as follows:

"February 18, 1948
Orjoonikidze Street
No: 95, House 13
Erevan, Soviet Armenia

Hon. Benjamin Fielding, Commissioner of
Welfare of the City of New York, and
the Department of Welfare of the City
of New York
902 Broadway
New York, N. Y.

Gentlemen:

It is my wish that my daughter, Alice, who is at present in the physical custody of the New York Foundling Hospital, and my sons, Albert and George, who are at present in the physical custody of the Mission of the Immaculate Virgin, be reared in the faith of the Armenian Apostolic Orthodox Church. I do not wish them to remain in or to be reared in any other faith or religion.

All of my children, as well as my wife and I were baptized in the faith of the Armenian Apostolic Orthodox church, with the exception of Alice, the youngest child. I had previously consented to the baptism of the children as Roman Catholics under circumstances which I believed left me no alternative but to consent to such baptism. However, I want my children reared only in my faith and in no other faith, and I want you to take the necessary steps to put my wish into effect immediately after you receive this letter together with a formal demand.

I also request that my children be transferred to a Protestant institution. I have been informed by Bishop Tiran of the Armenian Church of North America and by Dr. Robert W. Searle of the Protestant Council of the City of New York, that they will make this possible. It is my hope that until the children rejoin me and the family that they can be placed through a Protestant institution in a satisfactory home of Armenian people of my faith. Therefore, I respectfully ask that you consider suggestions along this line from Bishop Tiran.

This letter together, with my formal demand will be delivered to you by my attorney, Mr. Samuel M. Blinken, to whom I have sent the papers with a request that he make such delivery to you.

Respectfully yours,

HAMPORTZOON CHOOLOKIAN."

The letter addressed to Bishop Nersoyan reads as follows:

"February 18, 1948
Orjoonikidze Street
No: 95, House 13
Erevan, Soviet Armenia

Bishop Tiran Nersoyan
Primate of the Armenian Church
of North America
336 West 20th Street
New York, New York

Your Grace:

I beg to acknowledge your letter of January 15, 1948. I am deeply grateful for the interest you have taken in the case and in the effort to obtain the freedom of my children, so that they may join me and my family in Soviet Armenia. I also appreciate the interest shown by the Protestant Council through Dr. Searle and the action of the American Civil Liberties Union in my behalf and would ask that you convey to them my thanks and the thanks of my family.

I can tell you that for the first time in my married life I have been able to establish a home for my family here in Soviet Armenia. You have no idea what it

means to be reunited with my family and old friends and to be together with my children in one home where we live happily together. My wife is being taken care of at the Erevan Psychotherapeutic Hospital, Gooniney Street, No. 93, Erevan, Soviet Armenia, where I frequently see her, and it would make all of us happy if my children in America could be together with us. Our happiness would be complete if my wife was well, but that is a matter for time and treatment to determine.

I heartily approve of the position you have taken and of your actions. You are perfectly right when you say that I tried to have the children transferred to a Protestant institution when I was in America. I wanted the children reared in the Armenian Apostolic Orthodox faith, which is my faith and the faith of my wife. The Department of Welfare arranged to place them with the two institutions because there was no Armenian institution to put them in. All of the children except Alice were baptized in my faith, that is the faith in which I wish them to be reared. However, when no Protestant institution could be found to accommodate my children, and not knowing what I could do about it, and since I did not wish to uproot them at the time, I agreed to let them be baptized as Roman Catholics. This was an act of expediency. I did it for the physical welfare of the children. It was not my intention then to have them reared as Roman Catholics but merely to have a place over their heads. Now I want them reared in my faith; I can take good care of them; I want them with me for I know they will be contented, well taken care of and happy. I am only too glad to authorize you, Dr. Searle and Mr. Blinken to take steps on my behalf for you will be doing exactly what I want you to do and I count on your cooperation and good will.

I am sending an authorization to Mr. Blinken, requesting that he deliver it to the Department of Welfare as well as to give separate copies to you and Dr. Searle. In that way the Department of Welfare will be instructed to have my children reared in the Armenian Apostolic Orthodox faith, to transfer the children to a Protestant institution and to enable you, Dr. Searle and Mr. Blinken to inquire about and to see my children on my behalf, as well as to carry out all

of my wishes in connection with my children. In addition, I am sending Mr. Blinken other papers to authorize steps to free my children in order that they can be sent to me.

Let me thank you for everything that you have done and that you will do in order to restore my children to me.

Respectfully yours,

HAMPORTZOON CHOOLOKIAN"

V

The State Courts made no finding of fact which would take this case out of the domain of federal law; nor is there any basis in the record for any such findings.

In an effort to justify their failure to argue the constitutional questions, counsel for the institutions fall back upon an alleged finding by the New York State Courts that petitioner was unfit to take care of his children, and the contention that petitioner was uncertain in his own mind as to the religion in which he wants his children reared. In the latter connection they refer to the so-called "Case History" of the Welfare Department, which is not part of the Record certified by the Court of Appeals, but was used in the New York Courts.

We have already demonstrated that petitioner's alleged unfitness or incapacity to take care of his children in Soviet Armenia is not a matter with which New York State is concerned. Nor is there any legal significance to his alleged vacillations on the subject of his children's religious upbringing at some time prior to the institution of the present proceedings.

Actually, however, the New York Courts made no such findings as are contended for by the respondents; nor is there any basis either in the certified Record or in the Case History for any such findings, and for the assertions that petitioner was at any time uncertain as to the religion in which he wanted his children brought up.

I. Petitioner's general character.

We respectfully submit that a reading both of the Record certified to by the Court of Appeals as well as the "Case History" will clearly demonstrate that petitioner not only was a loving father but capable of the greatest sacrifices in taking care of his children, and was generally high-minded and self-reliant,—preferring to live poorly on his own earnings rather than to be an object of charity even if the charity was public and not private. On the latter subject we call attention to the following entry on pages 2-3 of the Case History:

> "In July of 1933 Mr. C. was placed on Work Relief but was forced to give up the job in January of 1934 because of a hernia. In May 1935 Mr. C. requested that the case be closed because he had secured a job in Copian Grocery Store in New Jersey where he was earning about $58.00 a month. Although the family were in need of supplementary relief, in view of the father's low earnings, Mr. C. much preferred to remain off the relief rolls and did not make application for supplementary assistance."

Later portions of that History show the great sacrifices which petitioner was willing to make in order to keep his children together; and that his placing the children with the public institutions was forced upon him by continued misfortunes. His sense of responsibility and concern for and love of his children were also testified to at the trial, and was even given grudging recognition by the learned Justice who disposed of his children's fate (fols. 215-216, 254, 519, 521, 523, 524, 526, 561-562, 566-567, 1178).

II. Petitioner's concern about the religion of his children.

Counsel for the institutions-respondent would have this Court believe that petitioner had no firm conviction or settled desire with respect to the church or religion in which he wanted to bring up his children. But the Record discloses that at no time did petitioner have any doubt as to what religion he wanted his children to be brought up in

and that his consent for their baptism as Roman Catholics was wrung from him by the unfortunate circumstance that there was no institution of his own faith which could take care of the children, no Protestant home which had room for them, and by the refusal of the institutions-respondent to further care for them unless they were baptized as Roman Catholics (fols. 707, 915).

It is true that when the question of religion first came up he said that he preferred Catholic institutions to Protestant, but that was clearly due to a confusion in the interpretation of the word "Catholic". In this connection the attention of the Court is respectfully called to the fact that when petitioner was confronted with the question he said that he was a Catholic but did not believe in the Pope (fols. 727, 733). The head of the Armenian Church testified that that Church called itself "Catholic" in the sense of its being an "Orthodox" or "true" Church but that it was not Roman Catholic (fol. 785). As soon as petitioner discovered his error, and the fact that his Church was nearer in doctrine to Protestantism than to Catholicism, he demanded of the Welfare Department that his children be transferred to Protestant institutions. The Welfare Department thereupon began its long efforts to effectuate such a transfer, but without success. As to his real feelings upon his discovery of the true relation between his Church and the Roman Catholic and Protestant Churches, respectively, the Case History has the following to say under date of June 1, 1942:

> "Father called at the office on marginal date, although no appointment had been made to see him in the office. He repeated the information regarding his distress over his children's placement in a Roman Catholic institution. We mentioned that that had been his own request and that he had signed an affidavit to that effect and that we were rather surprised that he had again changed his mind regarding the religious question. Mr. C. stated that he realized that he had made 'a terrible mistake and that he was sorry', but hoped that something could be done to transfer his

children to an institution where they could follow the Greek Orthodox faith. We reiterated our previous discussion regarding lack of institutions for his particular faith and reminded him that we had suggested that his children be placed in a Protestant institution but that because of his protest, they had been placed at the Mission of the Immaculate Virgin, a Roman Catholic institution. Father repeated that he is not a Protestant, does not want his children in an institution of that faith but does not want them in a Roman Catholic institution either. Only after another lengthy discussion regarding this, and after we had Mrs. Hickey, Unit Supervisor, speak to father to again explain regarding the religious question did he decide to have them transferred to one of the Protestant faith. He stated that he does not wish to have his children rebaptized in the Roman Catholic faith; that they had already been baptized once and that is enough. We questioned whether this was a decision reached by Mr. C. himself or whether it had been decided for him by his priest, Reverend Ferringer. Mr. C. stated that he had spoken to his priest but does not know his name as he seldom attends his church for religious services. We decided to phone both the M. I. V. and N. Y. Foundling while father remained at the office in order to secure their version of the religious question and to ascertain whether they had made any attempts to rebaptize the children under their care" (C. H. pp. 23-24).

That the confusion was not only in petitioner's mind but in the minds of other people who were supposed to be better versed in such matters is apparent from the fact that those who made the entries in the Case History referred to petitioner's Church as "Greek Orthodox", and as "Russian Catholic" (fols. 704, 723, C. H., p. 23).

III. The State Courts made no finding that petitioner was unfit to take care of his children; nor could it have made any such finding in the face of the Record.

We respectfully submit that there is not the slightest warrant in the Record for the assertion made by counsel for the respondents that the New York State Courts had

found petitioner to be unfit to take care of his children. Indeed, such a finding could not possibly have been made in view of the Record. Had such a finding been made this Court, under its own rules, would have been obliged to disregard it, since it is belied by every page of the Record. Without burdening this brief by quoting copiously from the certified Record and the Case History it is sufficient to point to the fact that the Welfare Department had released to the petitioner his three oldest children in August and September, 1946, and had actually consented to the release to him of the three children involved in this litigation on the very day the writs were sued out. The question of "unfitness" is therefore clearly out of the case, even if it ever had a place in it,—*which it certainly did not and does not.*

IV. The "best interest of the children" sought to be "protected" by the State of New York did not include their material welfare.

The only actual finding which the Courts of the State of New York made in this case was that it would not be "for the best interest of the children" to accompany their father to Soviet Armenia. And a careful reading of the long opinion delivered by the learned justice at Special Term clearly demonstrates that the "best interest of the children" had nothing to do with their material welfare, but solely with the danger apprehended by him from their exposure to religious and political ideas of which he disapproved plus the alleged hazard to their American citizenship. It is true that he made a labored attempt to show that there was no sufficient guarantee of their material welfare in Soviet Armenia. But that attempt utterly failed, and this Court would have a right to disregard his animadversions on the subject of the Soviet guarantee even if it had a place in this case,—which it certainly hasn't.

Counsel for respondents, following their determination not to discuss the constitutional questions involved in this case, ignored the legal aspects of this question in their brief. Instead, they attempt to disparage the guarantee

of the Soviet Union by asserting that it was too vague. And here, again, faithful to their method of disparaging the salient facts in the case, they conveniently forget the fact that there were two documents delivered by the Soviet Union to the Welfare Department of the New York City, *and that the second document was prepared by the Welfare Department itself.* The Record shows that the first document was not satisfactory to the Welfare Department because of alleged vagueness. Thereupon the Department prepared its own document to meet this objection; and that it was after the execution and delivery of this second document, that the Welfare Department consented to the release of the children. We have pointed out in our main brief that the Welfare Department had no right to exact such a guarantee. But there it was. *And it was in the very language of the Welfare Department, specifically chosen to meet the objection of vagueness* (fols. 562, 566, 573-574, 575, 577-580, 1025-1028).

As we have already stated, this entire question of the material welfare of the children in Soviet Armenia was outside the competence of the State of New York to inquire into. *This question is therefore constitutionally outside this case.* However, in view of the fact that counsel for the institutions have devoted practically their entire brief to this subject, we may be excused for devoting a little more space to it. While it does not bear on the legal problem involved, it does show a lack of *bona fides* on the part of counsel for the respondents in claiming that this issue had been properly determined against the petitioner according to the law of the State of New York, and a similar lack of *bona fides* in the claim that the Welfare Department had never consented to the release of the children on October 31, 1947.

It should be borne in mind that under the law of the State of New York the Welfare Department of the City of New York is the agency especially entrusted with the material and moral well-being of children in its custody, and vested with the power of determining the circumstanecs

under which children committed to its care may be released to the custody of their parents. The question of determining whether such a release is for "the best interest of the children" is therefore, primarily, one for the determination of the Welfare Department. The Courts have nothing to do with it, unless resort is had to them by an aggrieved parent claiming that the decision of the Welfare Department was arbitrary.

In making this determination it is, of course, for the Welfare Department to determine all the questions which may affect "the best interest of the children". The Record shows that the Welfare Department was well acquainted with petitioner and his circumstances for many years past, and that it made a special investigation of the matter when he applied for the release of these children with the view of taking them to Soviet Armenia. It also shows that after such investigation it decided to release the children. That such determination was deliberate and made upon careful examination of the facts is also shown by the Record. On cross-examination by Mr. Coster, who now seeks to impugn that decision, Deputy Commissioner of Welfare Crystal M. Potter, who was in charge of the matter, testified as follows:

> "The *decision* in this individual case was based on information that I had received from Miss Shea and Miss Zimmerman, and the various factors which were that this father in this case had been a good father, he had been interested in the welfare of his children; we had every indication he loved his children; in fact, both the Institution and the Department of Welfare had agreed to release three of his children previously to him on the basis of the fact that he was a proper father; so that was one consideration. * * * We had letters from the Soviet Embassy indicating that these children would receive proper care. These children themselves, from the information I had, were very anxious to be reunited with their family. Our whole emphasis in the Department of Welfare, as it is with the private agencies, is to reunite families whenever possible, and I think in brief that was the reason behind the *decision*" (fols. 1067-1069). (Emphasis supplied.)

V. The question of the Welfare Department's consent.

The question of whether or not the Welfare Department had consented to the release of the Choolokian children is immaterial in this case, since they were entitled to their release irrespective of the State agency which sought to prevent the departure of the children from the United States. It is important, however, because it is a brick in the structure of State law which counsel for the respondents seek to erect in order to take this case out of the Federal domain. But upon examination it turns out to be a false brick.

Under the law of the State of New York the decision of the Welfare Department is final, and there is no provision in the laws of the State of New York for a resort to the courts by any person or institution dissatisfied with the decision of the Welfare Department to release its wards. In this case, however, the institutions-respondent refused to comply with the decision of the Welfare Department, *after they had first agreed to do so and actually prepared the children for departure,* with the result that petitioner had to resort to the courts (fols. 595-599).

That the Department had consented to the release cannot possibly be questioned in view of the testimony quoted above and the physical facts of the preparation of the children for their departure by the institutions themselves under instructions from the Welfare Department. Nor was the fact of *consent* actually questioned by the institutions-respondent or their counsel,—their claim being merely that they had a right to refuse to carry out that decision unless ordered to do so by the courts. In his brief in the Court of Appeals, Mr. Joseph V. McKee, one of the counsel signing the brief in this Court, made the point that the *consent* of the Department was insufficient and that a formal *order* was necessary. His exact words were as follows:

> "There seems to be little doubt that at one time previous to appellants suing out the writ, the Department had informally decided that the children could be trans-

ferred to appellant. This was in no sense an *order*. It was merely the *consent* of an agency having administrative or supervisory powers." (Italics in original.)

It so happens, however, that the statute in question (Section 383 of the Social Welfare Law) itself differentiates between *consent* and *order*. It does not require any *order* by the agency having charge of the children. The only provision for an *order* is a *court order* where resort to the Courts must be had because of the absence of the consent of the Committing Authority.

Nor did the Court of Appeals decide that a formal order was necessary.

In this Court, the same counsel claim that the decision of the Welfare Department was merely "tentative". This is clearly refuted by the following testimony given by Deputy Welfare Commissioner Potter:

"Q. *Are you the same Deputy Commissioner Potter who ordered the release of the three Choolokian children involved in this proceeding?* A. *Yes, I am.*

Q. *And did you order the release of those children after a review of all the facts in the case and consultation with counsel to the department?* A. *Yes, I did.*

Q. *Did you ever issue any order rescinding or changing your order for the release of these children?* A. *No, I didn't*" (fol. 1046).

"Q. *So far as the issue in this case is concerned, you have done nothing to change the order for the release of these children at any time subsequent to the order that you gave for their release?* A. *That is right*" (fols. 1050-1051). (Emphasis supplied.)

With this brick out, the entire structure of alleged State law falls apart, for the only agency which was expressly entrusted by the laws of the State of New York with the decision as to the propriety of the release of the wards in its custody has decided that their release was in the "best interest" of the Choolokian children.

VI. The real reason for the decision sought to be reviewed was the character of the political and religious ideas to which petitioner's children might be exposed in Soviet Armenia, plus the alleged hazard to the children's citizenship.

We respectfully submit that no one reading the record in this case can possibly excape the conclusion that the real reason for the decision sought to be reviewed is to be found in the two words "Soviet Armenia,"—or perhaps more exactly in the word "Soviet". In other words, the objection of the institutions-respondent and the New York State courts to the fact that petitioner's children would, if released into his custody, be exposed to religious and political ideas of which they disapprove. It is difficult to determine from the record which weighed more with whom. Probably the institutions-respondent were primarily interested in insuring the children's continuance in the Roman Catholic Church, while the courts were more interested in "protecting" the children's political ideas. This question need not detain us, since both considerations are equally obnoxious to the constitutional principles invoked by petitioner for the protection of his own rights and those of his children. Again, because of the elaborate attempt of counsel for respondents to cover up this fact we hope to be excused for giving a brief resume of the facts as they appear in the record.

The "story" begins when, to quote the language of the counsel for the institutions-respondent in their brief (pp. 11-12) in this Court——

> "* * * the respondent institutions remonstrated over the inadvisability of sending the children to permanent exile in Soviet Armenia, and stated that under the circumstances and on advice of counsel they would not feel warranted in releasing them without a court order."

The Record shows that at no time in their history had either of the institutions-respondent ever refused to obey such a decision of the Welfare Department (fols. 1014, 1042). Indeed, they could not possibly do so, since they

have no shadow of legal right to keep such children except that given them by the Welfare Department. This revolt of the institutions against the Welfare Department was followed by their "returns" to the writs of habeas corpus, the substance of which was the same as their "remonstrance" as formulated above by their counsel. And this was followed by a long trial mainly devoted to an inquiry into three questions, in the following order of importance: (1) the religious education of the children of Soviet Armenia; (2) The "Un-American" way of life to which they might be exposed in that country; and (3) the hazard to the children's citizenship because of their going to Soviet Armenia. All the rest, whatever there was of it, was mere pretense and shadow-boxing designed to hide the real constitutional issues behind a false facade of State Law.

CONCLUSION

We respectfully submit that this case involves grave constitutional questions important, to quote the language of one of the counsel for the institutions-respondent, "to every American citizen and every American institution". These questions have therefore properly aroused great public interest, and the active participation in this struggle for political and religious liberty of the American Civil Liberties Union, whose interest in civil liberties is well known, and such important religious bodies as the Protestant Council of the City of New York and the Armenian Church in North America, besides such important religious and civic leaders as have banded together in order to form the "National Committee for the Rights of the Choolokian Family". The writ of certiorari prayed for should therefore be granted.

Dated: New York, February 16, 1950.

Respectfully submitted,

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